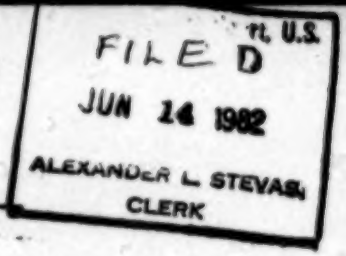
81-2297



NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1981

ROBERT EARL WARD, JR.
a/k/a "BUCK" WARD,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR CERTIORARI - CRIMINAL CASE

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Elizabeth F. Kuniholm

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR CERTIORARI - CRIMINAL CASE

The Petitioner, Robert Earl Earl, Jr. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 19, 1982, and affirmed by the denial of a Petition for Rehearing on April 14, 1982.

QUESTION PRESENTED

As part of the Fifth Amendment prohibition against double jeopardy, is the federal government collaterally estopped from relitigating the issue of a defendant's participation in a crime where prior to being tried in federal court he was acquitted by a jury in state court of a crime arising from the same facts and where the federal government's attorney trying the federal charges assisted in the trial of the state charges?

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OPINION BELOW

The opinion of the Court of Appeals below (Appendix E) is reported in 676 F. 2d 94. The judgment in the District Court below (Appendix C) was not reported.

JURISDICTION

The judgment of the Court below was entered on February 19, 1982. Rehearing was denied on April 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTION, STATUTES, AND REGULATIONS

The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

15 U.S.C. §2614:

§2614. Prohibited Acts

It shall be unlawful for any person to -

(1) fail or refuse to comply with . . . any rule promulgated or order issued under section 5 or 6 [15 U.S.C. §§2604, 2605];

18 U.S.C. §2:

§2 Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

15 U.S.C. §2605:

> §2605. Regulation of hazardous chemical substances and mixtures.
>
> (e) Polychlorinated biphenyls. (1) Within six months after the effective date of this Act . . . the Administrator shall promulgate rules to -
>
> (A) prescribe methods for the disposal of polychlorinated biphenyls . . . .

N.C. Gen. Stat. §14-127:

> §14-127. Wilful and Wanton Injury To Real Property. - If any person shall wilfully and wantonly damage, injure or destroy any real property whatsoever, either of a public or private nature, he shall be guilty of a misdemeanor and shall be punished by fine or imprisonment or both, in the discretion of the Court.

40 C.F.R. §761.10:

> §761.10 (b) PCB Mixtures. (1) Except as provided in paragraphs (b) (2), (3) and (4) of this section, any PCB mixture shall be disposed of in an incinerator which complies with Annex I.
>
> . . .

STATEMENT OF CASE

A. Course Of The Proceedings. The Petitioner, Robert Earl (Buck) Ward, Jr., was charged in an eight-count indictment, filed on January 22, 1979, with causing or aiding and abetting the improper disposal of the chemical polychlorinated biphenyls (PCBs). Prior to trial, Petitioner moved to dismiss, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, on the ground that the prosecution violated the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. By order entered on September 8, 1980, this Motion was denied.

The case came on for trial in the Federal District Court for the Eastern District of North Carolina in Raleigh, North Carolina, on May 18, 1981,

before The Honorable W. Earl Britt, Judge Presiding, and a jury. Following the reception of evidence, argument of counsel, and instructions by the Court, the jury returned a verdict finding the Petitioner guilty on each of the eight counts. The Court entered judgment sentencing the Petitioner to imprisonment on each count and the payment of a $25,000.00 fine on each count.

The Petitioner's conviction was affirmed by the United States Court of Appeals for the Fourth Circuit on February 19, 1982, and a timely Petition for Rehearing was denied on April 14, 1982.

B. Facts Relevant To This Petition.

The Petitioner owns and operates Ward Transformer Company which reconditions and sells used transformers. Most of

these transformers contain oil and many contain oil laced with PCB. The PCB raises the temperature at which the oil will ignite (the "flash point") and it causes the oil to be non-conductive of electric current (dielectric).

On its premises, the Company accumulated, over the years, a substantial quantity of PCB-laced oil. This oil was stored in drums, in a holding tank, and in transformers on the yard.

In 1976, Congress enacted the Toxic Substances Control Act, 15 USC §§2601 - 2629 (1976). Section 6(e)(1) of that Act, 15 USC §2605(e)(1), directed the Administrator of the Environmental Protection Agency (EPA) to promulgate rules regarding the processing, distribution, use and disposal of PCB chemicals. In addition, §6(e)(2), Id. §2605(e)(2),

prohibited the manufacture, processing, distribution, or use of any PCB "other than in a totally enclosed manner," except as authorized by the EPA.

On December 30, 1977, EPA published notice of its intention to promulgate regulations implementing this ban.

Robert J. Burns, known as Bob, was a resident of Jamestown, New York. He and Buck Ward had been close personal friends since 1959 or 1960. Over the years, while Buck managed Ward Transformer Company, he and Bob joined together in many business ventures on the side. By early 1978, Burns owed Buck approximately $50,000 as a result of these ventures.

In early 1978, Burns spent a lot of time in Raleigh, visiting Buck at home and on the premises of Ward Transformer Company. Burns considered himself business and personal friends of the Company's employees, and he had

the run of the place.

During this time, Burns became interested in the problems posed for Ward Transformer Company by the new PCB regulations. He undertook to learn all that he could about the coming regulations. He visited EPA in Washington and Atlanta, read the regulations in industry publications and talked to people in the industry around the country. Because he believed that the tight regulation of the disposal and manufacture of PCBs would make PCB oil unavailable, and because he knew this oil would be required for use in electric transformers, he believed there would be a ready market for PCB-laced oil. He therefore set out to accumulate all the existing PCB oil. To implement his plan, he founded Transformer Sales Company of Jamestown, New York. He then set about acquiring PCB oil for

his company. He entered into an agreement with Buck Ward that he would remove the PCB oil from the Ward Transformer premises for $1.70 per gallon. By terms of this oral agreement, the title to the oil would pass to Burns at the moment it went through the gate at Ward Transformer Company. By separate agreement between Burns and Ward, Burns paid Buck $.70 out of each $1.70 to be credited toward the $50,000 debt which Burns owed Buck.

Before executing this agreement, Ward insisted that his attorneys look over the plan and approve it.

In April, 1978, Burns began removing oil from the Ward Transformer premises. Most of the oil was stored in 55-gallon drums. He simply loaded these, intact, onto trucks, and transported them to the warehouse in Pennsylvania. After the drums were

removed he transported some oil in bulk by tanker and by large van-type trucks in the backs of which he installed 750 gallon tanks.

After about three months of hauling the oil to Pennsylvania, he decided to stop making the trip and start dumping the oil. He had been having difficulty obtaining drums for storage, his plan was not as profitable as he first anticipated, and the only oil remaining at Ward Transformer Company was "contaminated" and "not resaleable".

There then ensued a dumping incident at Ft. Bragg, North Carolina, which was not the subject of either the state or federal indictment. Burns testified that he informed Ward prior to dumping at Ft. Bragg. Ward testified that Burns told him about this dumping after the fact, and vowed never to do it again.

After this incident, Burns and his two sons dumped the remaining oil from Ward Transformer Company along North Carolina highways in excess of ten times. According to Burns, Ward was generally aware of these dumpings before they occurred. Ward testified that he was never told of the incidents. The federal indictment alleges eight instances of improper disposal occurring between July 28, 1978 and August 2, 1978.

The dumping was discovered almost immediately, and Burns was implicated soon thereafter. During August, 1978 until early 1979, Burns maintained that Buck Ward and the people at Ward Transformer Company had no knowledge of the dumping. In January, 1979, Burns testified before a Federal Grand Jury in Raleigh, North Carolina and the State Grand Jury in Halifax County, North Carolina.

On January 22, 1979, both the State and Federal Grand Jurys returned indictments against the Petitioner.

The State indictments alleged three counts of dumping PCB-laced oil on the roadsides. They alleged that the oil originated at Ward Transformer Co. and was dumped by Robert Burns. They further alleged that the Petitioner was an accessory before the fact and that he conspired with Burns to damage real property owned by North Carolina and adjacent to ighways and roadbeds located "in the various counties" of North Carolina. App. A at All .

The Federal indictment alleged eight counts of causing and aiding and abetting the unlawful disposal of PCB in violation of federal law. The incidents alleged included those which were the subject of the State indictments.

The State indictments came to trial first. On June 4, 1979, the Petitioner was tried before a jury in Halifax County, North Carolina. Counsel for the United States Environmental Protection Agency, Ms. Gwen Newsome, attended this trial in Halifax County, and consulted extensively with attorneys for the State of North Carolina prosecuting the action against the Petitioner. At the conclusion of a week long trial the Petitioner was found not guilty by a jury verdict.

The federal charges came to trial in June of 1981. The evidence presented to the jury in the federal trial was essentially the same as that presented to the state jury, with the exception that under the federal statutes involved, the prosecution was required to prove that the oil dumped

contained more than 500 parts per million PCBs. To prove this, the prosecution offered scientific witnesses from the Environmental Protection Agency.

At the conclusion of the federal trial, the Petitioner was found guilty of causing or aiding and abetting the unlawful disposal of PCBs and was sentenced to a year in prison on each of seven counts and six months in prison on the eighth count, as well as $25,000 fine on each of the eight counts.

REASONS FOR GRANTING THE WRIT

REVIEW OF THE ISSUES PRESENTED BY THIS PETITION IS IMPORTANT, BECAUSE THE GOVERNMENT'S ACTION IN PROSECUTING THE PETITIONER AFTER ASSISTING IN A STATE PROSECUTION THAT AROSE FROM THE SAME FACTS AND THAT ENDED IN ACQUITTAL PRESENTS GREAT POTENTIAL FOR ABUSE AND IS IN CONFLICT WITH THE PRINCIPLES ENUNCIATED IN ASHE V. SWENSON.

I. THE GOVERNMENT'S ACTION IN PROSECUTING PETITIONER AFTER PARTICIPATION IN A PREVIOUS PROSECUTION IN THE STATE COURT WHICH WAS BASED UPON THE SAME FACTS AND WHICH RESULTED IN A STATE COURT ACQUITTAL IS IN CONFLICT WITH THE PRINCIPLES ENUNCIATED IN ASHE V. SWENSON

In Ashe v. Swenson, 397 U.S. 436, 25 L. Ed. 2d 469, 90 S. Ct. 1189 (1970), several men robbed a six-man poker game. The defendant was tried for robbing one of the men and was found not guilty. Six weeks later, the defendant was tried for robbing another of the men and was convicted. The question before the Court was whether the doctrine of

collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy. In holding that collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy, the Court stated:

> The question is not whether Missouri could validly charge the petitioner with six separate offenses for the robbery of the six poker players. It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again.

397 U.S. at 446

While the facts in the case at bar render it distinguishable from those in Ashe v. Swenson, the principles enunciated there are controlling and a Writ of Certiorari should be issued to review all the circumstances surrounding these proceedings.

A brief recitation of facts aids in establishing the reasons Ashe controls in this case. In 1978 oil laced with PCBs appeared in a narrow strip along some North Carolina roadsides. App. A at A1, A6 . Bob Burns was arrested and charged with dumping the oil. He admitted to dumping but said the oil had come from Petitioner's warehouse and that Petitioner had known about and approved the dumping.

Both the Federal and State authorities moved to indict Burns and Petitioner. Federal and State indictments were returned the same day, January 22, 1979. Although the indictments charged violations of different statutes, Petitioner's role in the alleged violations was alleged to be precisely the same. The Federal indictment alleged improper disposal of PCBs in violation of 15 U.S.C. §2614(1)(c) and aiding and abetting improper disposition of the materials in violation of 18 U.S.C. §2.

The State alleged damage to its property and aiding and abetting such damage in violation of N.C. Gen. Stat. 14-127. It was necessary in each prosecution to allege and prove the same misconduct by the petitioner to obtain a conviction.

Thus, although the Federal and State statutes sought to punish a separate mischief and although each carried a separate punishment Petitioner could not be convicted of violating either statute unless it was proved beyond a reasonable doubt that he knew the material was being dumped and aided and abetted the dumping.

The heart and soul of each prosecution was Petitioner's knowledge of the dumping. He could not aid and abet dumping he did not know was going on.

Petitioner was acquitted in the State court on a general verdict of not guilty by the jury. During the State trial

E.P.A. attorney, Gwen Newsome, was present, conferring with trial counsel for the State and participating in planning and strategy. She was in attendance throughout the trial.

The issue of Petitioner's knowledge was squarely before the jury. There was no escaping it. Either Petitioner knew or he did not. Either he aided and abetted or he did not. The jury determined through its general verdict, that he did not know. There is no other rational explanation for its verdict. In the face of evidence that thousands of gallons of oil had been dumped on North Carolina roadsides, it is not reasonable that the jury could have hung its hat on a finding of no damage to State property.

The Federal trial occurred two years after the State trial was concluded. The issue before the Federal jury was the same as that before the State jury. Did

the Petitioner know about the dumpings? E.P.A. attorney, Gwen Newsome, was again present. She examined and cross-examined witnesses. She participated fully in the trial and was one of the laboring oars for the prosecution. The government used the State trial as a dress rehearsal and dry run. Petitioner was required to run the gauntlet again. The witnesses were the same. It was a reunion of parties and witnesses both for the government and for the defense.

The key witness for the government was Bob Burns. He also was the key witness in the State prosecution. He said the same things. The only difference in the two trials was the outcome. With an opportunity to refine and streamline, the government was successful. The prevailing view in the Petitioner's camp was: You can't beat the same team two times in one season.

In Ashe v. Swenson, 397 U.S. at 445, the Court said:

> The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury, by its verdict, found that he had not. The federal rule of law, therefore, would make a second prosecution for the robbery of Roberts wholly impermissible.

In the case before the North Carolina jury the single rationally conceivable issue in dispute was whether Petitioner knew about the dumping of PCBs along North Carolina roadsides.

There was no way the jury could have ducked this issue. A second prosecution for aiding and abetting the dumping of PCBs along North Carolina roadsides was, therefore, wholly impermissible.

II. THE POTENTIAL FOR ABUSE IS UNUSUALLY GREAT IN INSTANCES INVOLVING SERIAL PROSECUTION AND THE MISCHIEF DONE IN THIS CASE BY RETRIAL AFTER ACQUITTAL DEMONSTRATES THE NEED FOR ISSUANCE OF THE WRIT.

The Courts have long recognized that one of the most precious principles of our

jurisprudence is the assurance that serial prosecutions will not be tolerated. No action of government would more rapidly erode the confidence of the people in our judiciary than a hypertechnical application of double jeopardy guarantees. This is why the Court in Ashe v. Swenson, 397 U.S. at 444, stated:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at

> least in every case where the first judgment was based upon a general verdict of acquittal. (Emphasis added)(Citations omitted).

In this case those statements are especially pithy. The E.P.A. attorney bridged the gap between the two prosecutions bringing continuity and insight. She was privy to the State's planning in the first trial and she was able to bring refinement, judgment and power to the second trial.

The dual sovereignty doctrine protects legitimate government prosecutions which occur after State acquittals. However, in instances like the one at bar the concept of dual sovereignty takes on a new significance. Using the first trial as a dress rehearsal the prosecutor converts the dual sovereignty doctrine into a mighty sword. No defendant can match the resources of government. Given enough tries the authorities can convict even an innocent person.

III. THE WRIT SHOULD BE GRANTED BECAUSE THERE IS NEED FOR CLARIFICATION OF THE RELATIONSHIP BETWEEN ASHE V. SWENSON AND BLOCKBURGER V. UNITED STATES.

In Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), defendant was charged in a five count indictment with violation of the Harrison Narcotics Act. The jury found defendant guilty in counts two, three and five. Count two charged a sale on a specified day and count three charged a sale on a separate day to the same person. The fifth count charged that the sale referred to in count three was, in addition to the violation alleged in count three, a separate violation because it was not in pursuance of a written order of the purchaser as required by statute. In addressing the question of whether one act could constitute a foundation for violation of two separate statutes and therefore be

punishable under two separate charges the Court said:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.

284 U.S. at 304.

Thus the Court held that the one sale constituted two offenses. In the case at bar the Court below based its denial of relief to Petitioner on the rationale of Blockburger. App. E at A44. However, Blockburger is clearly distinguishable from the facts in this case because it did not involve serial prosecutions but, instead, prosecution in one forum on one occasion. Petitioner submits that it was error to deny relief on the rationale of Blockburger and that this error presents a compelling reason to grant a Writ of Certiorari. However, even more compelling than this error and its

impact upon the Petitioner is the need for clarification on the distinction between Blockburger and Ashe v. Swenson

CONCLUSION

For the reasons stated, a Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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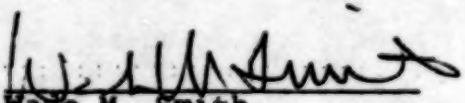
Roger W. Smith

Elizabeth F. Kuniholm

CERTIFICATE OF SERVICE

I certify that I served the foregoing Petition for Writ of Certiorari on the United States Government by placing three copies in the United States Mail at Raleigh, North Carolina, postage prepaid, addressed to all opposing counsel.

This the 14th day of June, 1982.



Wade M. Smith
Counsel for Petitioner

APPENDIX

APPENDIX A

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
COUNTY OF HALIFAX	SUPERIOR COURT DIVISION
	January 22 Session, 1979

THE STATE OF NORTH CAROLINA	) INDICTMENT
	)Count I:
	) Accessory
	) Before the
v.	) Fact
	)Count II:
	) Accessory
	) Before the
	) Fact
ROBERT EARL "BUCK" WARD, JR.	)Count III:
Defendant.	)Conspiracy

COUNT I

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT THAT: Robert Earl "Buck" Ward, Jr., between the dates of June 1, 1978 and August 17, 1978, as well before such dates as after, and more specifically on or about the 20th day of June, 1978, with force and arms at and in the County of Halifax, State of North Carolina, unlawfully, wilfully, and felo-

niously, did incite, induce, encourage, advise, procure, aid, counsel and command Robert Burns, Timothy Burns, and Randall Burns, to unlawfully, wilfully, feloniously, maliciously, wantonly, infamously, in secret and with malice, damage and destroy real property of the State of North Carolina immediately beside and adjacent to North Carolina State Highway No. 43, beginning at the Warren County line, proceeding into Halifax County for approximately 1.4 miles to North Carolina State Highway No. 561, then southerly along North Carolina State Highway No. 561 for a distance of 4.3 miles to the Franklin County line. All such highways, lands adjacent thereto, shoulders, and roadbeds and rights-of-way as herein described are the property of the State of North Carolina. Such injury, damage and destruction to such property as aforesaid was caused on or about the 28th day of July, 1978 by the wilfull, intentional, secret, wanton, infamous and malicious depositing

thereon of the dangerous, harmful, toxic, carcinogenic, chemical agent PCB (Polychlorinated Biphenyls) in liquid form, combined with other liquid agents, which chemical agents saturated the earth, damaged this State property thereby, causing both a health and safety hazard and actual injury to the property.

The acts of the defendant in counseling, commanding, aiding, procuring, inciting, inducing, encouraging and advising the commission of this felonious damage to property of the State were as set forth herein. The defendant, by and through the business corporation, Ward Transformer Company, Inc. of Wake County, provided to Robert Burns, Timothy Burns, and Randall Burns, 15,000 gallons of Polychlorinated Biphenyls in combination with liquid agents to be disposed of. The defendant suggested and agreed to a plan with Robert Burns to dispose of such PCB's by pouring said chemical agents along highways and roadbeds of the State of North Carolina in, among other places, rural Halifax County. Defendant provided infor-

mation, encouragements and suggestions to Robert Burns regarding the best possible location to dump PCB materials throughout the State such that detection would be minimized. Defendant assisted and aided in the acquisition of a 750-gallon capacity tank to be utilized for the purpose of secretly dumping such PCB materials along the highways. Defendant agreed to pay Robert Burns, Timothy Burns, and Randall Burns approximately $1.70 per gallon for the disposal of such materials through the funds of the corporation, on the condition that he would personally receive a 70-cent-per gallon cash return (kick-back). Defendant provided keys to the premises of the corporation which allowed Robert Burns, Timothy Burns, and Randall Burns ingress and egress of such premises at any hour for the purpose of loading PCB materials into the tank of their vehicle undetected by the public or employees of Ward Transformer Company, Inc. The aforesaid acts, inducements, information, encouragement and advice provided by

the defendant were intended to aid and assist and did in fact aid and assist and furnish the means whereby the principal perpetrators, Robert Burns, Timothy Burns, and Randall Burns, were able to carry out this crime. By the commission of such acts the defendant did be and become an accessory before the fact to the crime of feloniously, infamously, in secret with malice, wilfully and wantonly damaging and destroying real property of the State of North Carolina located in Halifax County. This act was done against the common law of North Carolina and against the peace and dignity of the State. The principal crime which constitutes a violation of G.S. §14-127, becomes a felony by the infamous, secret and malicious manner in which it was committed by virtue of G.S. §14-3. The defendant's acts in aiding, counseling, procuring and commanding the commission of such principal crime are in violation of the common law and of G.S. §14-5.

COUNT II

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT THAT: Robert Earl "Buck" Ward, Jr., between the dates of June 1, 1978 and August 17, 1978, as well before such dates as after, and more specifically on or about the 20th day of June, 1978, with force and arms at and in the County of Halifax, State of North Carolina, unlawfully, wilfully, and feloniously, did incite, induce, encourage, advise, procure, aid, counsel and command Robert Burns, Timothy Burns, and Randall Burns, to unlawfully, wilfully, feloniously, maliciously, wantonly, infamously, in secret and with malice, damage and destroy real property of the State of North Carolina immediately beside and adjacent to North Carolina Highway No. 4 in Halifax County for a distance of 2.6 miles, to where said highway adjoins Rural Paved Road No. 1308, then such property beside and adjacent to Rural Paved Road No. 1308 for a distance of 2.4 miles. All such highways, lands adjacent thereto, shoulders, and road-

beds and rights-of-way as herein described are the property of the State of North Carolina. Such injury, damage and destruction to such property as aforesaid was caused on or about the 28th day of July, 1978 by the wilfull, intentional, secret, wanton, infamous and malicious depositing thereon of the dangerous, harmful, toxic, carcinogenic, chemical agent PCB (Polychlorinated Biphenyls) in liquid form, combined with other liquid agents, which chemical agents saturated the earth, damaged this State property thereby, causing both a health and safety hazard and actual injury to the property.

The acts of the defendant in counseling, commanding, aiding, procuring, inciting, inducing, encouraging and advising the commission of this felonious damage to property of the State were as set forth herein. The defendant, by and through the business corporation, Ward Transformer Company, Inc. of Wake County, provided to Robert Burns, Timothy Burns, and Randall Burns, 15,000 gallons of

Polychlorinated Biphenyls in combination with liquid agents to be disposed of. The defendant suggested and agreed to a plan with Robert Burns to dispose of such PCB's by pouring said chemical agents along highways and roadbeds of the State of North Carolina in, among other places, rural Halifax County. Defendant provided information, encouragements and suggestions to Robert Burns regarding the best possible location to dump PCB materials throughout the State such that detection would be minimized. Defendant assisted and aided in the acquisition of a 750-gallon capacity tank to be utilized for the purpose of secretly dumping such PCB materials along the highways. Defendant agreed to pay Robert Burns, Timothy Burns, and Randall Burns approximately $1.70 per gallon for the disposal of such materials through the funds of the corporation, on the condition that he would personally receive a 70-cent per gallon cash return (kick-back). Defendant provided keys to the premises of the

corporation which allowed Robert Burns, Timothy Burns, and Randall Burns ingress and egress of such premises at any hour for the purpose of loading PCB materials into the tank of their vehicle undetected by the public or employees of Ward Transformer Company, Inc. The aforesaid acts, inducements, information, encouragement and advice provided by the defendant were intended to aid and assist and did in fact aid and assist and furnish the means whereby the principal perpetrators, Robert Burns, Timothy Burns, and Randall Burns, were able to carry out this crime. By the commission of such acts the defendant did be and become an accessory before the fact to the crime of feloniously, infamously, in secret with malice, wilfully and wantonly damaging and destroying real property of the State of North Carolina located in Halifax County. This act was done against the common law of North Carolina and against the peace and dignity of the State. The principal crime which constitutes a violation of G.S. §14-127, becomes a felony

by the infamous, secret and malicious manner in which it was committed by virtue of G.S. §14-3. The defendant's acts in aiding, counseling, procuring and commanding the commission of such principal crime are in violation of the common law and of G.S. §14-5.

COUNT III

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT THAT: Robert Earl "Buck" Ward, Jr., between the dates of June 1, 1978 and August 17, 1978, as well before as after the said dates, and more specifically on or about June 20, 1978 in Halifax County, with force and arms, unlawfully, wilfully and feloniously, and with common design and set purpose and in a secret manner, did combine, confederate, scheme, agree and conspire together with Robert Burns, Timothy Burns, Randall Burns, Robert Earl "Bob" Ward, III, Ward Transformer Company, Inc. and diverse other persons to unite with the common object and purpose of wilfully, wantonly, maliciously, infamously, feloniously and secretely, violating the common law, N.C.

G.S. §14-127 and N.C. G.S. §14-3, in that the said Robert Earl "Buck" Ward, Jr. did unite, conspire and agree as aforesaid to unlawfully, wilfully, feloniously, maliciously, wantonly, infamously, in secret with malice, damage and destroy real property of the State of North Carolina by the wilfull, intentional, secret, wanton, infamous and malicious depositing thereon of the dangerous, harmful, toxic, carcinogenic chemical agent PCB (Poly-chlorinated Biphenyls) in liquid form, combined with other liquid agents, such real property located beside and adjacent to highways and roadbeds of the State of North Carolina, including Cumberland County and Halifax County. Such felonious conspiracy and unlawful agreement was committed in violation of the common law and against the peace and dignity of the State.

/s/
W. H. S. BURGWYN, JR.
DISTRICT ATTORNEY

/s/
DONALD W. STEPHENS
ASSISTANT ATTORNEY GENERAL
SPECIAL PROSECUTOR

WITNESSES:

Roger Allen

Terry Turbeville

Those marked x sworn by the undersigned foreman, and examined before the Grand Jury, and this bill found yes A TRUE BILL.

Attesting the concurrence of 12 or more Grand Jurors.

Foreman, Grand Jury

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

UNITED STATES OF AMERICA	:	INDICTMENT
	:	(15,U.S.C.,Sec.2614
-vs-	:	(1)(c) and 18,
	:	U.S.C.,Sec.2)
ROBERT EARL WARD, JR.	:	
a/k/a "Buck" Ward	:	
ROBERT EARL WARD III	:	

The Grand Jury charges:

FIRST COUNT

That between on or about the 28th day of July, 1978, and on or about the 2nd day of August, 1978, in the Eastern District of North Carolina, ROBERT EARL WARD, JR., a/k/a "Buck" Ward, and ROBERT EARL WARD III, knowingly and willfully caused polychlorinated biphenyls, also known as PCB's, to be disposed of, said disposal occurring in Johnston and Harnett Counties, North Carolina, in violation of Title 15, United States Code, Section 2614(1)(c) and a rule promulgated under Title 15, United States Code, Section 2605(e), to wit: Title 40,

Code of Federal Regulations, Section 761.10(b) and Title 18, United States Code, Section 2(b), and also did aid, abet, counsel, command, induce, and procure said unlawful disposal in violation of Title 18, United States Code, Section 2(a).

SECOND COUNT

That between on or about the 28th day of July, 1978, and on or about the 2nd day of August, 1978, in the Eastern District of North Carolina, ROBERT EARL WARD, JR., a/k/a "Buck" Ward, and ROBERT EARL WARD III, knowingly and willfully caused polychlorinated biphenyls, also known as PCB's, to be disposed of, said disposal occurring in Franklin, Warren, and Halifax Counties, North Carolina, in violation of Title 15, United States Code, Section 2614(1)(c) and a rule promulgated under Title 15, United States Code, Section 2605(e), to wit: Title 40, Code of Federal Regulations, Section 761.10(b) and Title 18, United States Code, Section 2(b), and also did aid, abet,

counsel, command, induce, and procure said unlawful disposal in violation of Title 18, United States Code, Section 2(a).

THIRD COUNT

That between on or about the 28th day of July, 1978, and on or about the 2nd day of August, 1978, in the Eastern District of North Carolina, ROBERT EARL WARD, JR., a/k/a "Buck" Ward, and ROBERT EARL WARD III, knowingly and willfully caused polychlorinated biphenyls, also known as PCB's, to be disposed of, said disposal occurring in Granville County, North Carolina, in violation of Title 15, United States Code, Section 2614(1)(c) and a rule promulgated under Title 15, United States Code, Section 2605(e), to wit: Title 40, Code of Federal Regulations, Section 761.10(b) and Title 18, United States Code, Section 2(b), and also did aid, abet, counsel, command, incude, and procure said unlawful disposal in violation of Title 18, United States Code, Section 2(a).

FOURTH COUNT

That between on or about the 28th day of July, 1978, and on or about the 2nd day of August, 1978, in the Eastern District of North Carolina, ROBERT EARL WARD, JR., a/k/a "Buck" Ward, and ROBERT EARL WARD III, knowingly and willfully caused polychlorinated biphenyls, also known as PCB's, to be disposed of, said disposal occurring in Harnett County, North Carolina, in violation of Title 15, United States Code, Section 2614(1)(c) and a rule promulgated under Title 15, United States Code, Section 2605(e), to wit: Title 40, Code of Federal Regulations, Section 761.10(b) and Title 18, United States Code, Section 2(b), and also did aid, abet, counsel, command, induce, and procure said unlawful disposal in violation of Title 18, United States Code, Section 2(a).

FIFTH COUNT

That between on or about the 28th day of July, 1978, and on or about the 2nd day of August, 1978, in the Eastern District of

North carolina, ROBERT EARL WARD, JR., a/k/a "Buck" Ward, and ROBERT EARL WARD III, knowingly and willfully caused polychlorinated biphenyls, also known as PCB's, to be disposed of, said disposal occurring in Wake, Nash and Franklin Counties, North Carolina, in violation of Title 15, United States Code, Section 2614(1)(c) and a rule promulgated under Title 15, United States Code, Section 2605(e), to wit: Title 40, Code of Federal Regulations, Section 761.10(b) and Title 18, United States Code, Section 2(b), and also did aid, abet, counsel, command, induce, and procure said unlawful disposal in violation of Title 18, United States Code, Section 2(a).

SIXTH COUNT

That between on or about the 28th day of July, 1978, and on or about the 2nd day of August, 1978, in the Eastern District of North Carolina, ROBERT EARL WARD, JR., a/k/a "Buck" Ward, and ROBERT EARL WARD III, knowingly and willfully caused polychlorinated

biphenyls, also known as PCB's, to be disposed of, said disposal occurring in Nash County, North Carolina, in violation of Title 15, United States Code, Section 2614(1)(c) and a rule promulgated under Title 15, United States Code, Section 2605(e), to wit: Title 40, Code of Federal Regulations, Section 761.10(b) and Title 18, United States Code, Section 2(b), and also did aid, abet, counsel, command, induce, and procure said unlawful disposal in violation of Title 18, United States Code, Section 2(a).

SEVENTH COUNT

That between on or about the 28th day of July, 1978, and on or about the 2nd day of August, 1978, in the Eastern District of North Carolina, ROBERT EARL WARD, JR., a/k/a "Buck" Ward, and ROBERT EARL WARD III, knowingly and willfully caused polychlorinated biphenyls, also known as PCB's, to be disposed of, said disposal occurring in Halifax County, North Carolina, in violation of

Title 15, United States Code, Section 2614(1)(c) and a rule promulgated under Title 15, United States Code, Section 2605(e), to wit: Title 40, Code of Federal Regulations, Section 761.10(b) and Title 18, United States Code, Section 2(b), and also did aid, abet, counsel, command, induce, and procure said unlawful disposal in violation of Title 18, United States Code, Section 2(a).

EIGHTH COUNT

That between on or about the 28th day of July, 1978, and on or about the 2nd day of August, 1978, in the Eastern District of North Carolina, ROBERT EARL WARD, JR., a/k/a "Buck" Ward, and ROBERT EARL WARD III, knowingly and willfully caused polychlorinated biphenyls, also known as PCB's, to be disposed of, said disposal occurring in Wilson and Edgecombe Counties, North Carolina, in violation of Title 15, United States Code, Section 2614(1)(c) and a rule promulgated under Title 15, United States Code, Section

2605(e), to wit: Title 40, Code of Federal Regulations, Section 761.10(b) and Title 18, United States Code, Section 2(b), and also did aid, abet, counsel, command, induce, and procure said unlawful disposal in violation of Title 18, United States Code, Section 2(a).

A TRUE BILL

s/ _____
FOREMAN

James Blackburn
ASSISTANT UNITED STATES
ATTORNEY

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

NO. 79-4-01-CR-5

UNITED STATES OF AMERICA	)
	) JUDGMENT AND PRO-
v.	) BATION/COMMITTMENT
	) ORDER
ROBERT EARL WARD, JR.	)

In the presence of the Attorney for the Government the defendant appeared in person on June 22, 1981 with counsel Roger W. Smith and Wade M. Smith. He entered a plea of not guilty. There was a verdict of guilty by the jury in counts 1 through 8 on May 22, 1981. Defendant was convicted of knowingly and wilfully causing Polychlorinated Biphenyls, also known as PCB, to be disposed of - in violation of 15 U.S.C. 2614 (1)(c) and 18 U.S.C. 2 as charged in counts 1 through 8.

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to

the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Count I - One (1) year; and fined the sum of $25,000.00 to be paid in one lump sum by July 1, 1981.

Count II - One (1) year - sentence to run consecutively to sentence imposed in Count 1; and fined the sum of $25,000.00 to be paid in one lump sum by July 1, 1981.

Count III - Six (6) months - sentence to run consecutively to sentence imposed in Count II; and fined the sum of $25,000.00 to be paid in one lump sum by July 1, 1981.

Count IV - One (1) year - sentence to run consecutively with sentence imposed in Count III; and fined the sum of $25,000.00 to be paid in one lump sum by July 1, 1981.

Execution of the sentence of imprisonment only suspended and the defendant placed on probation for a period of five (5) years

to run consecutively to confinement and to commence upon release in Count III by parole or otherwise, under the general conditions as recorded in the Clerk's Office.

Count V - One (1) year - sentence to run concurrently with sentence imposed in Count IV; and fined the sum of $25,000.00 to be paid in one lump sum by July 1, 1981.

Execution of the sentence of imprisonment only suspended and the defendant placed on probation for a period of five (5) years under the general conditions as recorded in the Clerk's Office. Probation sentence to run concurrently with the probation sentence imposed in Count IV.

Count VI - One (1) year - sentence to run concurrently with sentence imposed in Count IV; and fined the sum of $25,000.00 to be paid in one lump sum by July 1, 1981.

Execution of the sentence of imprisonment only suspended and the defendant placed on probation for a period of five (5) years, under the general conditions as recorded in

the Clerk's Office. Probation sentence to run concurrently with the probation sentence imposed in County IV.

Count VII - One (1) year - sentence to run concurrently with the sentence imposed in Count IV; and fined the sum of $25,000.00 to be paid in one lump sum by July 1, 1981.

Execution of the sentence of imprisonment only suspended and the defendant placed on probation for a period of five (5) years, under the general conditions as recorded in the Clerk' Office. Probation sentence to run concurrently with the probation sentence imposed in Count IV.

Count VIII - One (1) year - sentence to run concurrently with the sentence imposed in Count IV; and fined the sum of $25,000.00 to be paid in one lump sum by July 1, 1981.

Execution of the sentence of imprisonment only suspended and the defendant placed on probation for a period of five (5) years, under the general condition as recorded in the Clerk's Office. Probation sentence to

run concurrently with the probation sentence imposed in Count IV.

Special Conditions of Probation

Defendant to perform a community service eight hours per week as related to environmental protection as approved by a probation office.

Defendant allowed to go under existing bond and report our own expense to designated prison facility upon notification from U.S. Marshall not earlier than August 1, 1981.

Date: 22 June 1981

/s/
W. Earl Britt
U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 79-4-01-CR-5

UNITED STATES OF AMERICA	)	
	)	
vs.	)	STIPULATION
	)	
ROBERT EARL WARD, JR.	)	

Counsel for defendant and counsel for the United States Government hereby enter into stipulation for the purpose of identifying participation of certain parties in the trial of State of North Carolina vs. Robert Earl Ward, Jr., in Halifax County, North Carolina, June 4, 1979. To this end the parties stipulate as follows:

1. In the trial of State of North Carolina vs. Robert Earl Ward, Jr., on June 4, 1979, in Halifax County, North Carolina, the State offered the testimony of:

a. Robert J. Burns

b. Timothy Burns

c. Randy Burns

c. Steve Hall

d. Lavon Revells

These were the only Halifax witnesses who testified at the federal trial. And the remaining witnesses at the federal trial did not testify at the Halifax trial.

2. Gwen Newsome, counsel for the United States Environmental Protection Agency, attended the trial in Halifax, North Carolina, and consulted with attorneys for the State of North Carolina prosecuting the action against defendant Ward.

3. The following individuals testified for the defendant Robert Earl Ward, Jr.:

a. Robert E. Ward, Jr.

b. Dave Cockman

c. John Boyd

d. Ed Reams

e. Wilbur Becton

f. Fred Clemmons

g. Ivy Brantley

h. John Ray

i. Ralph Lewis

j. Leon Westbrook

k. George C. Thompson

4. The defendant was charged in Halifax County, North Carolina, with conspiracy to violate and being accessory before the fact to violation of North Carolina General Statute 14-127 which provides as follows:

> If any person shall wilfully and wantonly damage, injure or destroy any real property whatsoever, either of a public or private nature, he shall be guilty of a misdemeanor and shall be punished by fine or imprisonment or both, in the discretion of the Court.

5. The trial in Halifax County was before a North Carolina Superior Court judge and jury and the trial consumed one week, at the conclusion of which the jury upon deliberation reached a verdict of not guilty.

This the 22nd day of June, 1981.

THARRINGTON, SMITH &
HARGROVE

By _____
Wade M. Smith

By: _____
Roger W. Smith

P. O. Box 1151
Raleigh, N.C. 27602
Telephone:
(919) 821-4711

CERTIFICATE OF SERVICE

I certify that on the 22nd day of June, 1981, I served a copy of the foregoing Motion on Mr. James L. Blackburn, United States Attorney, Federal Building, New Bern Avenue, Raleigh, North Carolina.

_____
Wade M. Smith

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-5162

UNITED STATES OF AMERICA,

Appellee,

v.

Robert Earl Ward, Jr.
a/k/a "Buck Ward,

Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina at Raleigh. W. Earl Britt, District Judge.

Argued: December 11, 1981
Decided: February 19, 1982

Before BRYAN, Senior Circuit Judge, ERVIN and CHAPMAN, Circuit Judges.

Roger W. Smith (Wade M. Smith, Elizabeth F. Kuniholm, Tharrington, Smith & Hargrove on brief) for Appellant; Anne Almy, U.S. Dept. of Justice (Anthony C. Liotta, Acting Assistant Attorney General, Land and Natural Resources Division; Peter Steenland, Nancy S. Bryson, U.S. Dept. of Justice on brief) for Appellee.

CHAPMAN, Circuit Judge:

Robert Earl Ward, Jr. appeals his conviction on eight counts of unlawful disposal of toxic substances [15 U.S.C. §§2614, 2605 and 40 C.F.R. §761.01(b)] and aiding and abetting the unlawful disposal of toxic substances [18 U.S.C. §2]. Ward contends (1) that the evidence is insufficient to support a conviction, (2) that his federal prosecution is a violation of his right not to be placed in double jeopardy, because he had been tried and acquitted on state charges arising out of the alleged disposal, (3) that opinions of government experts were based on speculation and, therefore, inadmissible, and (4) that testimony from his state court trial from a witness now deceased was improperly excluded in the district court. We affirm.

Ward is chairman of the board of Ward Transformer Company. The company is in the business of purchasing, rebuilding and

reselling used voltage transformers.1/ Many transformers contain oil laced with polychlorinated biphenyls (PCBs). The PCBs have a high ignition temperature or "flash point" which reduces the likelihood of fire in the event of transformer rupture. PCBs have been designated as toxic substances under the Toxic Substances Control Act (15 U.S.C. §§2601-2669) and accompanying regulations (40 C.F.R. part 761). Ward Transformer stored approximately 7500 gallons of PCB-laced oil from used transformers at its plant near Raleigh, North Carolina.

1/ A transformer is a piece of equipment used in electrical power distribution to transform electrical energy from a higher voltage to a lower voltage or vice-versa depending upon the end use to which the power is to be applied.

As it became clear that disposal of PCB oil would be tightly regulated under the above mentioned act and regulations, Robert Burns, a long time friend of Ward, approached Ward to present him with a business proposition whereby Burns would become the "PCB king". From his studies, Burns concluded that the new regulations would prohibit further manufacture of PCB chemicals, but would permit continued use of existing PCB-laced oil in electric transformers. Knowing also that transformer dealers would be eager to get rid of oil they had on hand, Burns felt he could acquire excess PCB oil from transformer dealers by charging a fee to remove it from their premises. He would store the oil then sell it back to dealers as they needed it for reconditioning used transformers. To implement this plan, Burns formed Transformer Sales Company, acquiring a storage facility in Youngsville, Pennsylvania.

Ward and Burns entered into an agreement whereby Burns would remove the 7500 gallons of oil from the Ward Transformer facility for a $1.70 per gallon removal fee. Burns was to be paid the full amount by check. He was to cash the checks and return seventy cents per gallon to Ward to retire an outstanding $50,000 debt.

Burns began to remove PCB oil from Ward Transformer's facility in 55 gallon drums and shipped them to Youngsville for storage. Two or three months into the operation, Burns realized that transportation and materials costs were making his venture unprofitable. He, therefore, devised a scheme, for which he sought Ward's approval, to dispose of the oil in remote areas by spraying it on the ground. Ward approved the plan and suggested at least one alternate dump site in South Carolina. Fort Bragg's impact range was decided on

as the best spot for the dump. Burns outfitted a truck with a 750 gallon tank and a spray nozzle at the Ward Transformer plant. Ward's employees assisted in this project.

On June 24, 1978, Burns filled his tank truck with PCB oil at the Ward Transformer plant, drove to Fort Bragg, dumped the oil, and returned for another load which was also dumped at Fort Bragg. Two problems were encountered during this trip. First, the truck got stuck in the sandy area where the oil was dumped, and second, the sandy soil did not absorb the oil as well as Burns had anticipated. Burns recommended that the oil be sprayed along rural roadsides in North Carolina. Ward approved the plan.

To avoid detection, Burns improved the design of the tank truck. The old design with the 750 gallon tank, enclosed in a box with swinging doors, required someone to ride in the rear to open and close the

doors. The new apparatus consisted of a pipe and nozzle directly behind the passenger door. When the dump site was reached the passenger would turn a valve directly behind his door and release the oil. Burns showed this new apparatus to Ward. All the work on the truck was done at Ward Transformer.

Burns' sons carried out the spraying operations in rural North Carolina. After loading the truck at Ward Transformer, the boys would pick out a stretch of rural road; the passenger would reach out and turn the valve releasing the contaminated oil; they would drive along at about 30 miles per hour dumping the oil in a four to six inch band along the roadside. On one occasion when the boys got stuck in the truck and had to call a wrecker, Burns reported to Ward that "nobody asked any questions."

Ward was advised on a daily basis of the progress of the unlawful disposal until August 4, 1978, when all the oil had been removed from Ward Transformer's plant.

The telltale strips of blackened grass along the rural North Carolina roadsides were quickly discovered by state and federal authorities. Shortly thereafter, Burns confessed to the unlawful dumping, at which time he stated that Ward had nothing to do with the scheme. When he learned that Ward was not participating in a plan to extricate the Burnses,2/ Burns repudiated his previous exculpatory statements and admitted that Ward had been intimately involved in the dumping scheme. Burns was the government's key witness on the issue of Ward's participation in the dumping scheme.

. . . . . .

2/ Robert Burns and his two sons were implicated in the investigations.

During the months immediately after discovery of the cump sites in North Carolina, authorities indicted Ward for malicious damage to real property under N.C.G.S. §§14-127, 14-3 and 14-5. Ward was acquitted by a state court jury.

Sufficiency of Evidence

The elements of the crime of causing the unlawful disposal of toxic substances under 15 U.S.C. §§2614, 2605 were correctly charged by the district court as (1) intentionally causing the disposal (2) of a PCB mixture containing 500 parts per million (ppm) or more PCBs (3) in a manner not authorized by 40 C.F.R. §761.10. The court also instructed that under 18 U.S.C. §2, whoever willfully aids, abets, counsels, commands, induces or procures the commission of the crime of unlawful disposal of toxic substances is punishable as a principal. Ward argues that the evidence at trial was

insufficient in four particulars.

First, Ward asserts that there was no evidence that the oil was dumped at the places alleged in the indictment. This contention is without merit. The Burnses testified as to the various general areas where they dumped oil and the appearance of the spills as four to six inch strips of oil approximately two inches from the pavement along the rural roadsides. The strips of PCB oil mentioned in the indictment correspond to the general locations testified to by the Burnses. Moreover, their descriptions of the disposal sites matched exactly the characteristics of the sites covered by the indictment. This evidence is sufficient to support an inference that the oily strips covered by the indictment were those left by the Burnses.

Ward next asserts that there is no evidence that the oil was disposed of when the indictment alleges. It is well settled,

however, that where an indictment alleges a crime occurred on or about a certain date, proof need only establish beyond a reasonable doubt that the crime occurred on a date reasonably near that alleged. Bradford v. U.S., 413 F. 2d 467 (5th Cir. 1969); U.S. v. Brody, 486 F. 2d 291 (8th Cir. 1973). The district court so instructed.

The Burnses testified that they made disposal runs throughout the week prior to the first date alleged in the indictment as well as during the period of July 28, 1978 through August 2, 1978 which was alleged. We find this testimony sufficient to support the jury's finding that the unlawful dumpings occurred on a date reasonably near that alleged in the indictment.

Third, Ward contends that the evidence presented at trial is insufficient to support an inference that he caused the disposal of the PCB oil or that he aided and abetted in the unlawful disposal.

He argues instead that there is only evidence of his knowledge of a general plan and his failure to take steps to stop it. We find, however, that there is a sufficient basis in the record from which the jury might properly infer that Ward was an active participant in the disposal scheme.

Most damaging to Ward is the testimony of Robert Burns3/ that for every change in

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3/ Ward argues that evidence of Burns' credibility was improperly excluded. Testimony of a witness in an earlier state court trial arising out of the same facts as the present case was offered as evidence that Burns had stated he was solely responsible for the dumpings. The witness died prior to the federal prosecution. The trial court concluded that the evidence merely tended to show that Burns had stated he signed a statement exculpatory of Ward. Because this evidence was already in the record and the government would have no opportunity to cross-examine the witness, the district court properly excluded the testimony as cumulative.

plan he sought and obtained approval from Ward, and that Ward himself suggested at least one alternate dump site. Other evidence from which the jury might conclude that Ward participated in the plan is the fact that outfitting and refinement of the disposal vehicles took place on the Ward Transformer premises with the aid of Ward employees.

Finally, Ward argues that there was insufficient evidence that the oil sprayed contained more than 500 ppm PCBs. The chemical analysis done by government experts indicated levels of PCBs in the soil samples taken from 2,200 ppm to 14,800 ppm. Ward argues that these tests only show what levels of PCBs were in the soil, not the level of PCBs in the mixture poured onto the soil. Expert

testimony,4/ as well as common sense, indicates that soil would dilute concentrations of PCBs poured onto it. This fact, coupled with the extremely high concentrations found in the soil, is sufficient to support the jury's finding that the oil disposed of contained at least 500 ppm PCBs.

4/ Ward argues that the opinions of the government experts on whether the oil (rather than the soil) contained 500 ppm PCBs are based on speculation and, therefore, entitled to no weight, since only soil was tested for PCB content. The conclusion reached by the experts that the oil contained the requisite amounts of PCBs was based on the extremely high levels found in the soil and their expert opinions that soil would dilute rather than increase those levels. Ward's contention that the tests are entitled to no weight because no tests were conducted that indicated the amounts of PCBs in the soil prior to the dumpings is without merit. Though experts did testify that PCBs have become so pervasive that they have even been found in mother's milk, they also testified that trace levels normally encountered in the environment are substantially less than levels found in the soil samples.

Double Jeopardy

Ward argues that this federal prosecution is a violation of his rights under the Fifth Amendment not to be placed in double jeopardy. Ward was tried and acquitted of state charges of malicious damage to real property under N.C.G.S. §§14-127, 14-3 and 14-5.

The state charges require a showing of malice and damage to real property; the federal charges do not. The federal charges require proof of disposal in a manner not approved by 40 C.F.R. §761.01(b); the state charges do not. The elements of the state and federal offenses here involved are, therefore, sufficiently different to avoid the proscription of the Double Jeopardy Clause. Blockburger v. U.S., 284 U.S. 299 (1932), Brown v. Ohio, 432 U.S. 161 (1977), Iannelli v. U.S., 420 U.S. 770 (1975).

AFFIRMED.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-5162

United States of America, Appellee,

versus

Robert Earl Ward, Jr., etc., Appellant.

O R D E R

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Chapman with the concurrences of Judge Bryan and Judge Ervin.

For the Court,

/s/ William K. Slate, II
Clerk